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THE WASHINGTON, D.C. SCHOOL CASE.

BY- WRIGHT, J. SKELLY

COURT OF APPEALS (DISTRICT OF COLUMBIA)

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THIS ARTICLE CONTAINS EXCERPTS FROM THE OPINION HANDED DOWN IN THE "HOBSON V. HANSEN" CASE. A SUIT HAD BEEN FILED IN 1966 IN THE UNITED STATES COURT OF APPEALS WHICH CHARGED THAT THE PUBLIC SCHOOL SYSTEM IN THE DISTRICT OF COLUMBIA WAS DISCRIMINATING UNCONSTITUTIONALLY AGAINST NEGROES AND POOR CHILDREN ON BOTH DE JURE AND DE FACTO GROUNDS. THE SUIT ALSO CLAIMED THAT UNDER THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION THE SCHOOL BOARD WAS OBLIGED TO REMEDY THE SITUATION. THE COURT HANDED DOWN THE OPINION THAT THE SCHOOL SYSTEM DID IN FACT DISCRIMINATE, AND DECREED THAT RACIAL OR ECONOMIC DISCRIMINATION BE PERMANENTLY ENJOINED IN THE PUBLIC SCHOOLS. THE COURT SET A COMPLIANCE DATE FOR THE ELIMINATION OF THE TRACK SYSTEM OF ABILITY GROUPING, FOR THE PROVISION OF VOLUNTARY BUSING TO UNDERPOPULATED SCHOOLS, AND FOR THE ABOLITION OF CERTAIN OPTIONAL SCHOOL ZONES. THE COURT ALSO ORDERED SUBSTANTIAL TEACHER INTEGRATION WITHIN EACH SCHOOL. THIS ARTICLE WAS PUBLISHED IN "INTEGRATED EDUCATION," VOLUME 5, NUMBER 4, ISSUE 28, AUGUST-SEPTEMBER 1967. (NH)

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THE WASHINGTON, D.C. SCHOOL CASE

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On January 13, 1966, Julius Hobson filed suit against District of Columbia School Superintendent Carl F. Hansen and the school board. He charged, variously, that the school system was unconstitutionally discriminating on de jure and de facto grounds; and that the board was positively obliged under the constitutional doctrine of equal protection of the laws to remedy the discrimination. On June 19, 1967, the U.S. ~~District Court~~ Court of Appeals for the District of Columbia rendered its decision. J. Skelly Wright, U.S. Circuit Judge, wrote the opinion in Hobson v. Hansen, Civil Action No. 82-66. Following are extracts from the full opinion except for the material under the heading "Opinion of the Law," which was written by the editor.

FINDINGS OF FACT

In *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), the Supreme Court held that the District of Columbia's racially segregated public school system violated the due process clause of the Fifth Amendment. The present litigation, brought in behalf of Negro as well as poor children generally in the District's public schools, tests the current compliance of those schools *Bolling*, its companion case, *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954), and their progeny. The basic question presented is whether the defendants, the Superintendent of Schools and the members of the board of education, in the operation of the public school system here, unconstitutionally deprive the District's Negro and poor public school children of their right to equal educational opportunity with the District's white and more affluent pubilc school children. This court concludes that they do.

In support of this conclusion the court makes the following principal findings of fact:

1. Racially and socially homogeneous schools damage the minds and spirit of all children who attend them — the Negro, the white, the poor and the affluent — and block the attainment of the broader goals of democratic education, whether the segregation occurs by law or by fact.

2. The scholastic achievement of the disadvantaged child, Negro and white, is strongly related to the racial and socio-economic composition of the student body of his school. A racially and socially integrated school environment increases the scholastic achievement of the disadvantaged child of whatever race.

3. The board of education, which is the statutory head of the public schools in the District, is appointed pursuant to a quota system which, until 1962, for over half a century had limited the Negro membership of the nine-man board to three. Since 1962 the Negro quota on the board has been four, one less than a majority. The city of Washington, which is the District of Columbia, presently has a population over 60% Negro and a public school population over 90% Negro.

4. Adherence to the neighborhood school policy by the school board effectively segregates the Negro and the poor children from the white and more affluent children in most of the District's public schools. This neighborhood school policy is relaxed by the board through the use of optional zones for the purpose of allowing white children, usually affluent white children, "trapped" in

a Negro school district, to "escape" to a "white" or more nearly white school, thus making the economic and racial segregation of the public school children more complete than it would otherwise be under a strict neighborhood school assignment plan.

5. The teachers and principals in the public schools are assigned so that generally the race of the faculty is the same as the race of the children. Thus most of the schools can be identifed as "Negro" or "white," not only by reference to the predominant race of the children attending, but by the predominant race of the faculty as well. The heaviest concentration of Negro faculty, usually 100%, is in the Negro ghetto schools.

6. The median annual per pupil expenditure ($292) in the predominantly (85-100%) Negro elementary schools in the District of Columbia has been a flat $100 below the median annual per pupil expenditure for its predominantly (85-100%) white schools ($392).

7. Generally the "white" schools are underpopulated while the "Negro" schools generally are overcrowded. Moreover, all of the white elementary schools have kindergartens. Some Negro schools are without kindergartens entirely while other Negro schools operate kindergartens in shifts or consecutive sessions. In addition to being overcrowded and short on kindergarten space, the school buildings in the Negro slums are ancient and run down. Only recently, through the use of impact aid and other federal funds, have the Negro slum schools had sufficient textbooks for the children's use.

8. As they proceed through the Washington school system, the reading scores primarily of the Negro and poor children, but not the white and middle class, fall increasingly behind the national norm. By senior high school the discrepancy reaches several grades.

> Negro and white children playing innocently together in the schoolyard are the primary liberating promise in a society imprisoned by racial consciousness.
>
> —U.S. Court of Appeals Judge J. Skelly Wright, *Hobson v. Hansen* (Washington, D. C. school case), June 19, 1967

9. The track system as used in the District's public schools is a form of ability grouping in which students are divided in separate, self-contained curricula or tracks ranging from "Basic" for the slow student to "Honors" for the gifted.

10. The aptitude tests used to assign children to the various tracks are standardized primarily on white middle class children. Since these tests do not relate to the Negro and disadvantaged child, track assignment based on such tests relegate Negro and disadvantaged children to the lower tracks from which, because of the reduced curricula and the absence of adequate remedial and compensatory e ducation, as well as continued inappropriate testing, the chance of escape is remote.

11. Education in the lower tracks is geared to what Dr. Hansen, the creator of the track system, calls the "blue collar" student. Thus such children, so stigmatized by inappropriate aptitude testing procedures, are denied equal opportunity to obtain the white collar education available to the white and more affluent children.

Other incidental, but highly indicative, findings are as follows: a. The June 1964-December 1965 study by the Office of the Surgeon General, Army, shows that 55.3% of the 18-year-olds from the District of Columbia failed the Army Services mental test, a higher percentage than any of the 50 states. b. The average per pupil expenditure in the District's public schools is only slightly below the national average. The 1964-65 Bureau of the Census Report on Governmental Finances shows, however, that the District of Columbia speeds less per capita on education generally than all states except Arkansas and Tennessee.

The same report shows that the District of Columbia spends more per capita on police protection than all states without exception. In fact, the District of Columbia spends more than double any state other than Nevada, New York, New Jersey and California. The inferences, including those bearing on the relationship of the quality of education to crime, which arise from these findings are obvious. Indeed, the National Crime Commission's Task Force Report: *Juvenile Delinquency and Youth Crime* indicates that the very deficiencies in the District's public school system noted by the record in this case — prejudging, through inappropriate testing, the learning abilities of the disadvantaged child as inferior to the white middle class child; placing the child in lower tracks for reduced education based on such tests, thus implementing the self-fulfilling prophecy phenomenon inherent in such misjudgments; placing inferior teachers in slum schools; continuing racial and economic segregation of pupils; providing textbooks unrelated to the lives of disadvantaged children; inadequate remedial prigrams for offsetting initial psychological and social difficulties of the disadvantaged child — all have contributed to the increase in crime, particularly juvenile crime.

In sum, all of the evidence in this case tends to show that the Washington school system is a monument to the cynicism of the power structure which governs the voteless capital of the greatest country on earth.

> The Washington [D.C.] school system is designed to destroy the minds of black people. When you turn out high school graduates reading at a 6th grade level, that's no accident. We need to tear down the school system, change it, and then build it up again.
>
> —Rev. James Bevel, May 1, 1967

OPINION OF LAW

The court acknowledged that the school board may have failed to disestablish legal segregation promptly and thoroughly enough after 1954. It held, however, that the plaintiffs failed to prove this; and that it is untimely to try to deal with such a charge so long after the event.

The court declared appropriate a revived "separate-but-equal" principle: " . . . If whites and Negroes, or rich and poor, are to be consigned to separate schools, pursuant to whatever policy, the minimum the Constitution will require and guarantee is that for their objectively measurable aspects these schools be run on the basis of real equality, at least unless any inequalities are adequately justified" (page 147). Where for any reason schools are segregated, the least the school board must provide are "materially equal" facilities.

The court declared that optional attendance zones, as applied in the District, produced "de jure constitutional violations" (p. 152). Another instance of *de jure* segregation cited is teacher segregation: "But if any truth is axiomatic, it is that the Negro *students'* equal protection rights to an integrated faculty cannot be undermined or thwarted by the racially induced preferences of the teachers, who after all are minor public officials whose actions must therefore pass constitutional muster" (p. 156). Segregation of principals is infected "with the identical unconstitutionality." (p. 158)

The court held that *de facto* segregation in the District . . . redounds to the academic detriment of Negro students and seriously sets back the working out of racial prejudices" (p. 162). This fact, however, was not held to "conclusively determine its unconstitutionality" (p. 162). While *de facto* segregation is not, as such, unconstitutional, yet its effects must be "carefully scrutinized" for violations of the principle of equal protection for the poor and racial minorities. "What supports this call" for close scrutiny, the court explained, are "our horror at inflicting any further injury on the Negro, the degree to which the poor and the Negro must rely on the public schools

in rescuing themselves from their depressed cultural and economic condition, and also our common need for the schools to serve as the public agency for neutralizing and normalizing race relations in this country" (p. 165).

Part of the careful scrutiny involves a search for viable alternatives to harmful de facto practices. The detriment resulting from de facto segregation cannot be justified constitutionally if alternatives to the detrimental condition have not been explored. Remedial alernatives must be sought. The court will consult competent judgment "on whether each specific remedial alternative is circumstantially feasible and within the public interest . . . . " (p. 170)

The track system, holds the court, deprives "the poor and a majority of the Negro students in the District of Columbia of their constitutional right to equal educational opportunities" (p. 170). Children are classified in the tracks not according to ability to learn but according to color and class, factors extraneous to innate ability. The track system thus "amounts to an unlawful discrimination against those students whose educational opportunities are being limited on the erroneous assumption that they are capable of accepting no more" (p. 176).

REMEDY

The remedy to be provided against the discriminatory policies of the defendants' school administration must center primarily on pupil assignment, teacher assignment and the track system. The overcrowding in the Negro schools results from pupil assignment and the difference in the per pupil expenditure results in the main from the assignment of the more highly paid teachers to the predominantly white schools. Consequently, corrective measures designed to reduce pupil and teacher racial segregation should also reduce overcrowding in the Negro schools as well as the pupil expenditure differential favoring the white children. Pending the implementation of such measures, the court will require that the defendants provide transportation to volunteering children from the overcrowded schools east of the Park to the underpopulated schools west of the Park.

As to the remedy with respect to the track system, the track system simply must be abolished. In practice, if not in concept, it discriminates against the disadvantaged child, particularly the Negro. Designed in 1955 as a means of protecting the school system against the ill effects of integrating with white children the Negro victims of *de jure* separate

> The relation of teacher segregation to the neighborhood school policy has been little touched on; but it is this court's conviction that teacher segregation, where it is allowed to reinforce pupil segregation, may well be a malignancy itself destructive of the constitutional health of a neighborhood school system. Certainly it is a circumstance driving the *de facto* pupil segregation that much closer to unconstitutionality.
>
> —U.S. Court of Appeals Judge J. Skelly Wright, *Hobson v. Hansen* (Washington, D. C. school case), June 19, 1967

but unequal education, it has survived to stigmatize the disadvantaged child of whatever race relegated to its lower tracks — from which tracks the possibility of switching upward, because of the absence of compensatory education, is remote.

Even in concept the track system is undemocratic and discriminatory. Its creator admits it is designed to prepare some children for white-collar, and other children for blue-collar jobs. Considering the tests used to determine which children should re-

> . . . The Negro *students'* equal protection rights to an integrated faculty cannot be undermined or thwarted by the racially induced preference of the teachers, who after all are minor public officials whose actions must therefore pass constitutional muster . . . . Ultimate authority for teacher assignment under the law is vested in the board of education. It cannot avoid constitutional responsibility when the public officers, including teachers, to whom it delegates the actual assignment power govern themselves according to illicit racial criteria.
>
> —U.S. Court of Appeals Judge J. Skelly Wright, *Hobson v. Hansen* (Washington, D. C. school case), June 19, 1967

ceive the blue-collar special, and which the white, the danger of children completing their education wearing the wrong collar is far too great for this democracy to tolerate. Moreover, any system of ability grouping which, through failure to include and implement the concept of compensatory education for the disadvantaged child or otherwise, fails in fact to bring the great majority of children into the mainstream of public education denies the children excluded equal educational opportunity and thus encounters the constitutional bar.

As has been shown, the defendants' pupil placement policies discriminate unconstitutionally against the Negro and the poor child whether tested by the principles of separate-but-equal, *de jure* or *de facto* segregation. The use by the defendants of the neighborhood school policy, intentionally manipulated in some instances to increase segregation, is the primary cause of the pupil assignment discrimination. Because of the 10 to one ratio of Negro to white children in the public schools of Washington and because the neighborhood policy is accepted and is in general use throughout the United States, the court is not barring its use here at this time.

In preparing the plan to alleviate pupil segregation which the court is ordering the defendants to file, however, the court will require that the defendants consider the advisability of establishing educational parks, particularly at the junior and senior high school levels, school pairing, Princeton and other approaches toward maximum effective integration. Where because of the density of residential segregation or for other reasons children in certain areas, particularly the slums, are denied the benefits of an integrated education, the court will require that the plan include compensatory education sufficient at least to overcome the detriment of segregation and thus provide, as nearly as possible, equal educational opportunity to all school children. Since segregation resulting from pupil assignment is so intimately related to school location, the court will require the defendants to include in their plan provision for the application of the principles herein announced to their $300,000,000 building program.

The plan, too, should anticipate the possibility that integration may be accomplished through cooperation with school districts in the metropolitan suburbs. There is no reason to conclude that all Washingtonians who make their homes in Virginia or Maryland accept the heresy that segregated public education is socially realistic and furthers the attainment of

> We will have to stop thinking in terms of cities and [start thinking] in terms of regions. In Washington [D.C.,] we could establish a ring of educational parks around the urban area — the center of Washington is about one mile in any direction — and draw on the inner city population for Negroes and the suburban population for whites.
>
> —Max Wolff, *United Teacher*, June 2, 1967

the goals of a democratic society. Certainly if the jurisdictions comprising the Washington metropolitan area can cooperate in the establishment of a metropolitan transit authority (see 1 *D.C. Code* pars. 1401-1416 (1961)), the possibility of such cooperation in the field of education should not be denied — at least not without first sounding the pertinent moral and social responsibilities of the parties concerned.

The final question is the remedy this court should forge for curing the illegalities in teacher placement. It is clear, first, that an injunction should be directed against every possibility of willful segregation in the teacher assignment process; if the preferences of principals and teachers are to be relied on at all by the assistant superintendents or any other officer making the assignment, measures must be taken to insure that race does not creep into the expression of preference.

Next, assignment of incoming teachers must proceed on a color-conscious basis to insure substantial and rapid teacher integration in every school. And finally, to the extent that these two measures are unable quickly to achieve sufficient faculty integration in the schools, this court, as it indicated by its discussion above concerning the board's responsibilities in following up on *Bolling* v. *Sharpe*, has no doubt that a substantial reassignment of the present teachers, including tenured staff, will be mandatory. A similar call has been sounded by the Office of Education, whose Title VI guidelines establish that "[e]very school system has a positive duty to make staff assignments and reassignments necessary to eliminate past discriminatory assignment policies." 45 C.F.R. par. 181.3 (d) (1967). *And* see the discussion and decree in *United States* v. *Jefferson County*, 5 Cir., 372 F.2d 836, 892-894, 900 (1967). In the South, a few courts in their discretion have exacted less inclusive commitments from school boards, relating merely to non-segregatory future assignments and the encouragement of voluntary transfers; but that does not bind the conscience of other chancellors confronted with other factual situations.

The more complex question is the goal or objective toward which the school system should strive through the various means outlined above. Two federal courts have ordered school systems to proportion Negro and white teachers equally in every school, give or take a small margin of error. *Dowell* v. *School Board*, W. D. Okla., 244 F. Supp. 971 (1965), *affirmed*, 10 Cir., ____ F.2d ____ (January 23, 1967), *cert. denied*, ____ U.S. ____, 35 *U.S.L. Week* 3419 (May 29, 1967); *Kier* v. *County School Board*, W.D. Va., 249 F. Supp. 239 (1966). It is true, however, that in *Dowell* the court assumed the initiative only after the school board defaulted in the obligation assigned it by the court to draw up a faculty desegregation plan, and *Kier* dealt with a school system with only 25 schools, which may make a difference. Still, there is great appeal in the simplicity and thoroughness of such a decree.

These issues of remedy were ignored at trial by counsel for both sides, each intent instead on establishing or refuting the primary constitutional violation. For this reason, and considering the limitations of time, for the 1967-68 school year the court is content to order "substantial" teacher integration in thos schools where complete segregation or token integration of faculty has heretofore existed. The court will remit the question of the longer term goal to the board for first-instance treament in the plan which the court in its decree will order the board to prepare.

> . . . In reading achievement in the District [of Columbia] schools, 67.2% of the students are reading at or above grade level in Grade 3 but by Grade 8 that percent has *dropped* to less than half (45.5%).
>
> —U.S. Court of Appeals Judge J. Skelly Wright, *Hobson* v. *Hansen* (Washington, D. C. school case), June 19, 1967

There will be an abundance of opportunity later for adversary argument on the merits and demerits of the ends (and means) concerning teacher integration which the Board decides to propose.

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1. *Clark* v. *Board of Educ.*, 8 Cir., 369 F.2d 661 (1966); *Wheeler* v. *Durham City Bd. of Educ.*, 4 Cir., 363 F. 2d 738 (1966).

PARTING WORD

It is regrettable, of course, that in deciding this case this court must act in an area so alien to its expertise. It would be far better indeed for these great social and political problems to be resolved in the political arena by other branches of government. But there are social and political problems which seem at times to defy such resolution. In such situations, under our system, the judiciary must bear a hand and accept its responsibility to assist in the solution where constitutional rights hang in the balance. So it was in *Brown* v. *Board of Education*, *Bolling* v. *Sharpe*, and *Baker* v. *Carr*. So it is in the South where federal courts are making brave attempts to implement the mandate of *Brown*. So it is here.

The decree is attached to, and made part of, this opinion.

DECREE

It is ORDERED, ADJUDGED and DECREED that the defendants, their agents, officers, employees and successors, and all those in active concert and participation with them be, and they are hereby, permanently enjoined from discriminating on the basis of racial or economic status in the operation of the District of Columbia public school system.

It is FURTHER ORDERED, ADJUDGED and DECREED that the defendants be, and they are hereby, permanently enjoined from operating the track system in the District of Columbia public schools. It is FURTHER ORDERED that on October 2, 1967, the defendants file in the record in this case a report of their compliance with this order of the court.

It is FURTHER ORDERED, ADJUDGED and DECREED that on October 2, 1967, the defendants herein file in the record in this case for approval by the court a plan of public assignment complying with the principles announced in the court's opinion and the instructions contained in the part styled REMEDY thereof.

It is FURTHER ORDERED, ADJUDGED and DECREED that the defendants, beginning with the school year 1967-68, provide transportation for volunteering children in overcrowded school districts east of Rock Creek Park to under populated schools west of the Park. It is FURTHER ORDERED that on October 2, 1967, the defendants file in the record in this case a report of their compliance with this order of the court.

It is FURTHER ORDERED, ADJUDGED and DECREED that, beginning with the school year 1967-68, the following optional zones be abolished: Wilson-Western-Roosevelt; Cardozo-Western; Dunbar-Western; Gordon-MacFarland; Gordon-Banneker; and Powell-Hearst. It is FURTHER ORDERED that on October 2, 1967, the defendants file in the record in this case a report of their compliance with this order of the court.

It is FURTHER ORDERED, ADJUDGED and DECREED that the defendants, beginning with the school year 1967-68, provide substantial teacher integration in the faculty of each school. It is FURTHER ORDERED that on October 2, 1967, the defendants file in the record in this case a re-

> White students cannot hold for themselves discriminatory preferences by holding over a school board the threat of withdrawal from the public schools.
>
> —U.S. Court of Appeals Judge J. Skelly Wright, *Hobson* v. *Hansen* (Washington, D. C. school case), June 19, 1967

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port of their compliance with this order of the court.

It is FURTHER ORDERED, ADJUDGED and DECREED that on October 2, 1967, the defendants file in the record in this case for approval by the court a plan of teacher assignment which will fully integrate the faculty of each school pursuant to the principles announced in the court's opinion and the instructions contained in the part styled REMEDY thereof.

It is FURTHER ORDERED, ADJUDGED and DECREED that the United States be, and it is hereby, invited to intervene in these proceedings to assist in the implementation of the decree, to suggest amendments to the decree, and to take whatever other steps it deems appropriate in the interest of public education in the District of Columbia. It is FURTHER ORDERED that the United States be served with a copy of this decree in the manner prescribed by Rule 4(d)(4), *Federal Rules of Civil Procedure*. The parties, of course, may suggest amendments to this decree at any time.

J. SKELLY WRIGHT
United States Circuit Judge

[See "Chronicle", above, p. 6]

CATHOLIC SCHOOL INTEGRATION IN WASHINGTON, D.C.

Jane L. Berdes

The author is a free-lance writer who has published, during the past year, in "National Catholic Reporter," "Ave Maria," "Sign," and "Catholic Family Digest."

"Integration begins at home," the disenchanted Negro's barb at crusading white civil righters, has at last been taken to heart by national leaders of the Roman Catholic parochial schools. Ecclesiastical authorities have launched a formal drive to take Church schools from racial isolation into some form of partnership with public schools in solving the equal education crisis.

The effort was, in a very real sense, made mandatory by the precedent-setting Elementary and Secondary Education Act of 1965 which included parochial school students from poverty situations as its beneficiaries. But it also reflects a change of heart among American Bishops concerning the responsibility of the Church to its environs.

The drive is taking two forms: First, the U.S. Catholic Conference's Department of Education has begun a racial census which will examine individual classrooms throughout the country and survey every parochial school teacher; then the National Catholic Education Association will sponsor a national parley next spring in Washington, D.C. The parley's planners hope that the documentation of parochial schools' integration inadequacies will be a basis for putting delegates in a mood to experiment radically with the future of the system.

It is promising that the parley is to be held in the Nation's Capital, scene of the most racially beleagured schools in the nation — public or parochial. Washington is also home base for both the Church's education agencies. For these reasons delegates to the parley would do well to familiarize themselves with the Church's integration crisis at home — in the District of Columbia. Otherwise, the current program to increase

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